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State v. Colburn: Montana's Rape Shield Law and the Rights of an Accused Under the Montana Constitution

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CASENOTE; *State v. Colburn*: Montana's rape shield law and the rights of an accused under the Montana Constitution

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I. INTRODUCTION

In *State v. Colburn*,[1] the Montana Supreme Court applied a balancing test to determine if evidence of prior abuse of a victim, to prove fabrication and an alternate source of knowledge, was improperly excluded under Montana's rape shield law.[2] Because Colburn's right to confrontation is fundamental under the Montana Constitution, however, the correct test is strict scrutiny. Further, the exclusion of the evidence was proper because it meets strict scrutiny.

II. PROCEDURAL POSTURE

A jury found James Morris Colburn guilty of both sexual intercourse without consent and sexual assault of his eleven-year-old neighbor, R.W.[3] The jury also found Colburn guilty of incest of his eleven-year-old daughter, C.C.[4]

At trial, the State called R.W., who testified in detail that Colburn molested her. The State also called C.C., who described inappropriate touching.[5] To support this testimony, the state called Nurse Practitioner Mary Hansen, who conducted forensic interviews of both girls.[6] She stated that both R.W. and C.C. gave statements consistent with children who had been molested.[7] Hansen stated that R.W. had sexual knowledge, indicating R.W. had been abused.[8] Hansen also testified that C.C. described in detail inappropriate touching by her father.[9]

Colburn intended to defend the charges involving his daughter, C.C., by attacking the interview techniques used by Hansen.[10] The court excluded Colburn's expert, Dr. Donna Zook, as unqualified.[11] She

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[1] State v. Colburn, 366 P.3d 258 (Mont. 2016).
[2] MONT. CODE ANN. § 45–5–511(2) (2015).
[3] *Colburn*, 366 P.3d at 260.
[4] *Id.*
[5] *Id.* at 264–65 (McKinnon, J., concurring). Justice McKinnon provides detail about C.C.'s trial testimony, noting that C.C. testified that Colburn touched her inappropriately, including reaching underneath her nightgown. *Id.* Surprisingly, the majority opinion opines that C.C. "denied generally that Colburn had done anything wrong to her." *Id.* at 260 (majority opinion).
[6] *Id.*
[7] *Colburn*, 366 P.3d at 261
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*

intended to opine that Hansen used leading questions in her interview of C.C.[12]

Colburn intended to defend the charges involving R.W. by proving that the allegations were fabricated and that R.W. had an alternative source of sexual knowledge.[13] Colburn's theory was that R.W. fabricated the allegations against Colburn to test if her mother would believe her, and when her mother took the allegations seriously, R.W. felt safe in disclosing that her father had molested her.[14] Colburn argued that R.W. gained the sexual knowledge disclosed in the Hansen interview from her father and not him.[15] One month after disclosing Colburn's abuse, R.W. disclosed the sexual abuse by her father, noting she only felt comfortable doing so because the allegations against Colburn were taken seriously.[16] R.W.'s father was charged with incest and plead guilty to sexual assault.[17]

Montana's rape shield law provides:

> Evidence concerning the sexual conduct of the victim is inadmissible in prosecutions under this part except evidence of the victim's past sexual conduct with the offender or evidence of specific instances of the victim's sexual activity to show the origin of semen, pregnancy, or disease that is at issue in the prosecution.[18]

The district court determined that R.W.'s prior molestation was inadmissible under this statute.[19]

Colburn appealed, challenging the exclusion of Dr. Zook's testimony and the exclusion of R.W.'s prior molestation, arguing the application of the rape shield law violated his constitutional right to present a defense.[20]

III. MAJORITY HOLDING

In a short opinion authored by Chief Justice Mike McGrath, the majority held for Colburn on both issues and remanded the case for a new trial.[21] First, the Court determined the district court abused its discretion in excluding Zook's testmony.[22]

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[12] *Id.*
[13] *Colburn*, 366 P.3d at 262.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 265 (McKinnon, J., concurring).
[17] *Id.*
[18] MONT. CODE ANN. § 45–5–511(2).
[19] *Colburn*, 366 P.3d at 262.
[20] *Id.* at 265.
[21] *Id.* at 264.
[22] *Id.* at 262.

Second, the majority held that the district court improperly applied the rape shield law without considering Colburn's right to present a defense.[23] The majority started by discussing the public policy of the rape shield law; that it is intended to prevent trying the victim, as the victim's prior sexual history is generally irrelevant to issues of consent or the victims truthfulness.[24] Montana's rape shield law extends to children, and the policy is similar: to protect children from having to defend past abuses and minimizing the trauma of testifying.[25]

The majority opined that conflicts can arise between rape shield statues and a defendant's rights to confrontation and a defense.[26] The Court held that a trial court must strike a balance between the defendant's and victim's rights, as neither are absolute.[27] Citing past cases, it held the rape shield law could not mechanistically or arbitrarily exclude evidence.[28] The majority provided guidance to trial courts, stating that they should consider whether the evidence is relevant and probative, whether the evidence is merely cumulative of the other admissible evidence, and whether the probative value of the evidence is outweighed by its prejudicial effect.[29] The Court specified that a defendant's evidence cannot be merely speculative or unsupported.[30] It notes the purpose of this analysis is to provide a fair trial for the defendant while, at the same time, upholding the compelling state interest of protecting victims.[31]

The Court ultimately held that the district court abused its discretion when it mechanistically applied the rape shield law instead of weighing the interests of the defendant and victim.[32] Notably, while the Court required the balancing, it did not expressly hold that the trial court must admit evidence of R.W.'s prior molestation at the second trial.

IV. JUSTICE MCKINNON'S CONCURRENCE

Justice McKinnon ultimately agreed with the outcome but wrote separately to provide guidance on how to apply the rape shield law in

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[23] *Id.* at 264.
[24] *Id.* at 261–61 (citing State v. Higley, 621 P.2d 1043, 1050–1051 (Mont. 1980); Michigan v. Lucas, 500 U.S. 145, 146 (1991); State v. Anderson, 686 P.2d 193, 199 (Mont. 1984); Tanya Bagne Marcketti, *Rape shield laws: DO They Shield the Children*, 78 IOWA L. REV. 754–55 (1993)).
[25] *Colburn*, 366 P.3d at 261–261 (citing Sec. 3, Ch. 172, Mont. L. 1985.; Marcketti, *supra* note 24, at 754–55).
[26] *Id.* at 263.
[27] *Id.* at 262 (citing State v. MacKinnon, 957 P.2d 23, 30 (Mont. 1998); State v. Johnson, 958 P.2d 1182, 1186 (Mont. 1998)).
[28] *Id.* at 263 (citing *Johnson*, 958 P.2d at 1186).
[29] *Id.* at 263 (citing Mont. R. Evid. 401, 402, 403 and 404; Commonwealth v. Fernsler, 715 A.2d 435, 440 (Pa. Sup. Ct. 1998); *Anderson*, 686 P.2d at 199).
[30] *Id.* at 263 (citing *Johnson*, 958 P.2d at 1186; State v. Lindberg, 196 P.3d 1252, 1264–65 (Mont. 2008)).
[31] *Colburn*, 366 P.3d at 262 (citing *Anderson*, 686 P.2d at 199).
[32] *Id.* at 264. Interestingly, despite holding the district court abused its discretion in its application of the rape shield law, the standard of review the court sets forth for application of a statute is correctness. *Colburn*, 366 P.3d at 260.

practice.[33] McKinnon noted additional factual details supplementing the brief majority opinion.[34] She also argued that because this was an evidentiary and constitutional matter, the proper standard of review was de novo.[35]

Justice McKinnon adopted the same balancing test as the majority for her analysis[36] and recognized that the Court made exceptions to the rape shield law in the past.[37] She suggested a two-step analysis, where a district court first identifies the permissible basis for admission and then balances the probative value of the evidence against the interest in protecting the integrity of the trial.[38] She argued there is no blanket exception to the rape shield law for motive to fabricate and alternative source of sexual knowledge.[39] Justice McKinnon argued that Colburn's constitutional rights were violated when he was denied the right to explore the witness's motives to fabricate and alternative source of knowledge.[40] She concluded that the district court improperly applied the rape shield law when it failed to balance Colburn's rights against the interests of the rape shield law.[41]

V. ANALYSIS

Criminal defendants have a right to present a meaningful defense under various provisions of both the Montana and Federal Constitution.[42] The exclusion of Zook's testimony contributed to the denial of Colburn's ability to present a defense. The second issue, regarding the application of Montana's rape shield law, will have long-lasting effects on Montana jurisprudence. The majority holding, that the Montana Constitution requires a balancing test when applying the rape shield law, was wrongly decided under the Montana Constitution.

Montana Courts have upheld the constitutionality of the rape shield law under the Federal Sixth and Fourteenth Amendments and Montana article II, section 17 and 24, which provide rights for the

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[33] *Id.* at 264 (McKinnon, J., concurring).
[34] *Id.* at 264–65.
[35] *Id.* at 265 (citing State v. Patterson, 291 P.3d 556, 558–559 (Mont. 2012); State v. Stock, 256 P.3d 899, 902 (Mont. 2011); State v. Derbyshire, 201 P.3d 811, 816–17 (Mont. 2009)).
[36] *Id.* at 266–67 (citing *Lindberg*, 196 P.3d at 1264–1265; Lajoie v. Thompson, 217 F.3d 663, 669 (9th Cir. 2000)).
[37] *Colburn*, 366 P.3d at 267 (citing *Johnson*, 958 P.2d at 1186; *Anderson*, 686 P.2d at 199) (victim's prior sexual assault allegations were admissible because they were proven untrue).
[38] *Id.* at 267.
[39] *Id.* at 267–68.
[40] *Id.* at 268.
[41] *Id.* at 269.
[42] State v. Jay, 298 P.3d 396, 404 (Mont. 2013) (citations omitted); Crane v. Kentucky, 476 U.S. 683, 690 (1986) (citations omitted). This right stems from due process, compulsory process and the confrontation clause, though I will refer to these rights generally as the confrontation right as it is most relevant to *Colburn*.

accused.[43] Unfortunately, the Montana Supreme Court has never clearly articulated the standard of scrutiny applied to the confrontation clause and has never decided if the Montana confrontation clause provides more protection than the Federal confrontation clause.

This provides little guidance to prosecutors and criminal defendants under the Court's balancing approach. Justice McKinnon recognized this lack of guidance; however, she conducted her analysis under the same incorrect balancing approach.

A. The Standard of Scrutiny

In past confrontation clause challenges to the Montana rape shield law, the Montana Supreme Court quoted the U.S. Supreme Court: "[t]he Sixth Amendment is not absolute, and may bow to accommodate other legitimate interests in the criminal trial process."[44] The U.S. Supreme Court has also opined that lawmakers have broad latitude under the Constitution to institute rules precluding evidence from criminal trials.[45] The Montana Supreme Court, through the adoption of this Federal language, seemed to hold that the confrontation right required only a legitimate state interest to infringe, implying the use of a lower standard of scrutiny. Yet, the Montana Supreme Court went on to justify the rape shield law with what it described as a "compelling state interest," implying a heightened standard of scrutiny.[46] The Montana Supreme Court also relies on the U.S. Supreme Court's holding in *Chambers v. Mississippi*,[47] where "rules may not be mechanistically applied to defeat the ends of justice." The Montana Supreme Court is not clear on the proper standard of scrutiny to apply to the rape shield law under the confrontation clause. Further, it is unclear whether the Montana Constitution provides an expanded confrontation right to criminal defendants. Because the Montana Constitution could provide more protection for the accused, the Constitutional analysis in this article is conducted under the Montana Constitution.

The Montana Supreme Court has held that it is not bound by the U.S. Supreme Court when developing the confrontation clause jurisprudence, as the Montana Constitution may guarantee greater rights than the Federal constitution.[48] Yet, the Montana Supreme Court has also acknowledged it has not yet afforded a greater confrontation right than the Federal constitution.[49] Under the Montana Constitution, Article II rights,

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[43] State v. Howell, 839 P.2d 87, 91 (Mont. 1992); State v. Steffes, 887 P.2d 1196, 1206 (Mont. 1994).
[44] *Id.* at 91 (Mont. 1992) (citing Chambers v. Mississippi, 410 U.S. 284, 295 (1973)).
[45] United States v. Scheffer, 523 U.S. 303, 308 (1998).
[46] *Howell*, 839 P.2d at 91 (Mont. 1992) (citing State v. Van Pelt, 805 P.2d 549 (Mont. 1991).
[47] Chambers v. Mississippi, 410 U.S. 284, 302 (1973).
[48] State v. Clark, 964 P.2d 766, 771 (Mont. 1998).
[49] City of Missoula v. Duane, 355 P.3d 729, 732–33 (Mont. 2015) (citations omitted).

including confrontation rights of an accused, are fundamental rights.[50] In Montana, laws which infringe upon a fundamental right employ strict scrutiny.[51] Thus, the proper standard of scrutiny for the confrontation clause under the Montana Constitution is strict scrutiny. Strict scrutiny requires both a compelling government interest and a showing by the government that the law is narrowly tailored to serve that compelling interest.[52] Further, due to this heightened standard of scrutiny, the Montana Constitution provides more protection for the rights of the accused than the Federal Constitution.

Here, Colburn presents an as-applied challenge to Montana's rape shield law. Given that he was essentially denied his only defense to the allegations involving R.W., his confrontation right was infringed by the application of the rape shield law. Therefore, we analyze the application of the rape shield law to Colburn under strict scrutiny, by asking if the law is narrowly tailored to a compelling state interest.

B. The Compelling Government Interest

The Montana Supreme Court held that the rape shield law served a compelling state interest in preventing a trial of a rape victim.[53] While this is certainly a compelling interest, the rape shield law serves a myriad of other public policy purposes. Consider the advisory comment to the Federal rape shield law:

> [T]he rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.[54]

There is a clear interest in protecting victims. National studies estimate 18 percent of women are raped at some time in their lives and 63 percent of sexual crimes go unreported.[55] There is a clear, compelling state interest in protecting alleged victims and encouraging victims to report assaults—

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[50] *Clark*, 964 P.2d at 771 (citations omitted).
[51] In re S.L.M., 951 P.2d 1365, 1371 (Mont. 1997).
[52] Mont. Cannabis Indus. Ass'n v. State, 286 P.3d 1161, 1165 (Mont. 2012).
[53] *Howell*, 839 P.2d at 91 (Mont. 1992) (citing *Van Pelt*, 805 P.2d at 549).
[54] Fed. R. Evid. 412 advisory comm. n. 1.
[55] National Sexual Violence Resource Center, Statistics About Sexual Violence, NSVRC.org, https://perma.cc/5PCQ–LSFG (Last visited April 20, 2016).

this is especially true for child sexual abuse, where 88 percent of cases go unreported.[56]

C. The Narrowly-Tailored Law

Instead of asking whether Montana's rape shield law is narrowly tailored, the *Colburn* court instead held that a trial court must strike a balance between the defendant and victim's rights.[57] This type of interest balancing, however, is not part of strict scrutiny.[58] Strict scrutiny is a balancing test, but only because it balances opposing claims.[59] The balancing is built in, as only compelling governmental interests with a narrowly tailored law can outweigh an individual right.[60] Interjecting an additional balancing element dilutes the scrutiny and gives courts broad discretion to strike down laws.[61] In this case, this balancing test makes the rape shield law meaningless, as balancing essentially reverts the analysis to the normal evidentiary relevance analysis.

The question the Court should address, instead of the balancing question, is whether the rape shield law is narrowly tailored to protecting victims of sexual violence, as-applied to Colburn's situation. For a law to be narrowly tailored, it must advance the interest, must not be under- or over-inclusive, and there must not be a less restrictive alternative.[62]

As applied to Colburn, the rape shield law excluded evidence that R.W. was molested in a prior incident by someone other than Colburn. First, the application advances the state interest of protecting a child from being traumatized during a cross examination where she is forced to discuss a prior molestation. This protection also serves to promote reporting and prosecuting sexual crimes. Even in the case of child victims, the rape shield protections make guardians, counselors, and prosecutors less hesitant to bring a case forward. Thus, in Colburn's case, the compelling state interest is advanced by the application of the rape shield statute.

The law is not under- or over-inclusive and there is no less restrictive alternative. Under Montana's rape shield law, all sexual conduct of the victim is excluded, with the narrow exceptions for sexual conduct between the victim and defendant as well as evidence showing the origin of semen, pregnancy, or disease. Allowing any additional evidence of the

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[56] *Id.*
[57] *Colburn*, 366 P.3d at 262 (majority opinion) (citing *State v. MacKinnon*, 957 P.2d 23, 30 (Mont. 1998); *State v. Johnson*, 958 P.2d 1182, 1186 (Mont. 1998)). This balancing test is used in the Federal courts. *See* Lajoie v. Thompson, 217 F.3d 663, 669 (9th Cir. 2000)).
[58] *Heller v. District of Columbia*, 670 F.3d 1244, 1265 (2011).
[59] Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2438–40 (1996).
[60] *Id.*
[61] *Id.*
[62] *Id.* at 2422 (collecting cases).

victim's sexual conduct would fail to protect victims and subject them to a harassing cross examination. In Colburn's case, there is no way to allow cross examination about prior sexual abuse without violating the protection provided to the victim. Thus, the application to Colburn is narrowly tailored to the compelling state interest.

Given this, even under strict scrutiny, the application of the rape shield law to exclude evidence of R.W.'s prior abuse does not violate Colburn's rights because the law is narrowly tailored to a compelling state interest.

D. The Future of Montana's Rape Shield Statute

The majority likely applied the improper balancing test instead of true strict scrutiny because it seemed unfair that Colburn was essentially denied his entire defense. Whether this is an equitable outcome or not, the Court's job is to determine whether the statute violates an individual's right, not whether the statute is fair. The fairness question is one for the legislature.

The Federal rape shield law may be a good model for legislators pondering the future of Montana's rape shield statute. Montana's rape shield law precludes evidence of all "sexual conduct" of a victim in prosecutions of sexual crimes and provides two exceptions: sexual conduct between the victim and offender or evidence to show the "origin of semen, pregnancy, or disease."[63] The Federal rape shield law[64] precludes a victim's sexual behavior or sexual predisposition in both criminal and civil matters alleging sexual misconduct and provides three exceptions.[65] The first two exceptions are similar to Montana's; however, the third exception is for "evidence whose exclusion would violate the defendant's constitutional rights."[66] The comments note the protections extend to the victim "except in *designated* circumstances in which the probative value of the evidence significantly outweighs possible harm to the victim."[67] The comments further elaborate on this:

> [E]vidence of specific instances of conduct may not be excluded if the result would be to deny a criminal defendant the protections afforded by the Constitution. For example, statements in which the victim has expressed an intent to have sex with the first person encountered on a particular occasion might not be excluded without violating the due process right of a rape defendant seeking

[63] MONT. CODE ANN. § 45–5–511(2).
[64] Fed. R. Evid. 412. The Federal rape shield law is in the Federal rules of evidence in the article on relevance; the Montana rape shield law is in the criminal code.
[65] *Id.*
[66] *Id.*
[67] Fed. R. Evid. 412 advisory comm. n. 2 (emphasis added).

> to prove consent . . . in various circumstances a defendant may have a right to introduce evidence otherwise precluded by an evidence rule under the Confrontation Clause.[68]

Under the Federal rape shield law, there are instances where a confrontation right may allow evidence otherwise excluded by the law, such as in Colburn's case. Along with these expanded rights for defendants, the Federal law provides broader protection for victims as well, extending the protection to civil trials and a range of topics broader than just "sexual conduct of the victim."[69]

VI. CONCLUSION

Several decades of Montana case law has failed to clearly articulate the confrontation protection provided by the Montana Constitution. This has led the Court to apply an improper balancing test. Because the confrontation right is a fundamental right, the proper test is strict scrutiny. Under this test, the exclusions of Colburn's proffered evidence was proper because Montana's rape shield law is narrowly tailored to a compelling state interest.

[68] Fed. R. Evid. 412 advisory comm. n. 17.
[69] Montana Courts have held that "sexual conduct of the victim" includes child sexual abuse. *Howell*, 839 P.2d at 92 (citations omitted).